

COHEN-JOHNSON, LLC
255 E. Warm Springs Road, Suite 100
Las Vegas, Nevada 89119
(702) 823-3500 FAX: (702) 823-3400

1 **COHEN-JOHNSON, LLC**
2 H. STAN JOHNSON, ESQ.
3 Nevada Bar No. 00265
4 sjohnson@cohenjohnson.com
5 MICHAEL V. HUGHES, ESQ.
6 Nevada Bar No. 13154
7 mhughes@cohenjohnson.com
8 Suite 100
9 255 East Warm Springs Road
10 Las Vegas, Nevada 89119
11 Telephone: (702) 823-3500
12 Facsimile: (702) 823-3400
13 *Attorneys for Debtor*
14 *Susan C. Keller*

10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF NEVADA**

12 In re:

13 SUSAN C. KELLER,

14 Debtor.

Case No.: 15-13626-MKN
Chapter 7

Hearing Date: 11/12/2015
Hearing Time: 2:30 p.m.

15 **OBJECTION TO BANK OF AMERICA'S PROOF OF CLAIM 4**

16 TO CREDITOR:

17 Bank of America, N.A.
18 c/o Nathan F. Smith, Esq.
19 MALCOLM CISNEROS
20 608 South 8th Street
Las Vegas, Nevada 89101

21 Regarding Claim 4, Filed August 7, 2015
22 Total Secured Claim Arrearages Amount: \$2,350.07

23 Debtor, Susan C. Keller, by and through her counsel, H. Stan Johnson, Esq. and Michael
24 V. Hughes, Esq. of the law firm of Cohen-Johnson, LLC, hereby respectfully submits this
25 Objection to the Proof of Claim of Bank of America (the "Creditor"). Creditors claim stems
26 from \$858.00 in attorney's fees and costs and \$1,427.07 in claimed escrow account deficiencies.
27 Rather than revise the Debtor's payments in ordinary course, Creditor has sought to include these
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1 amounts in a chapter 13 plan. The \$858.00 in attorney's fees and costs should be denied, with
 2 the remaining \$1,427.07 budgeted over the life of the loan just as Creditor would have done had
 3 the Debtor not filed for bankruptcy relief. In short, the Creditor's proof of claim should be
 4 removed from the register.
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6 This Objection is made and based on the points and authorities provided herein, the
 7 pleadings, papers, and other records on file with the clerk of the above-captioned Court, judicial
 8 notice of which is hereby requested, and the argument of counsel entertained by the Court at the
 9 time of the hearing of this Objection.
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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I.**

13 **BRIEF STATEMENT OF RELEVANT FACTS**

14 1. The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on
 15 June 23, 2015.

16 2. The bankruptcy case was compelled by the fact that GVRA failed to act
 17 reasonably in negotiating the repayment of HOA assessments and scheduled a foreclosure sale
 18 for June 26, 2015.
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20 3. On August 7, 2015 Creditor filed its claim seeking \$2,350.07 in secured
 21 arrearages. Docket Claim No. 4.

22 4. Debtor was not and is not deficient in her mortgage obligations to the creditor.

23 5. It is reasonable to compel Debtor to account for \$2,350.07 in her plan when the
 24 Creditor did not have to incur any attorneys fees. This matter could have been resolved easily by
 25 notifying the Debtor that her ordinary mortgage payments would have to increase to account for
 26 an escrow shortfall; which would have avoided nearly \$1,000 in attorney's fees and costs.
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2 6. If the Debtor were not in bankruptcy, she would have simply received a letter
3 notifying her of an increased payment due to the escrow balance, without having incurred the
4 creditor's attorney's fees and costs. Creditor could have submitted a "Notice of Mortgage
5 Payment Change" like they filed with the Court on August 27, 2015. Exhibit 1. Thus, there is
6 no reason why the Debtor by virtue of her bankruptcy should have to account for these increased
7 costs in her plan, especially when she has remained current on the mortgage.

8 II.

9 LEGAL STANDARD

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11 Section 502(a) of the Bankruptcy Code provides that any proof of claim "is deemed
12 allowed, unless a party in interest ... objects." *Ashford v. Consolidated Pioneer Mortg.* (*In re*
13 *Consolidated Pioneer Mortg.*), 178 B.R. 222, 225 (B.A.P. 9th Cir. 1995) (*citing Whitney v.*
14 *Dresser*, 200 U.S. 532, 534-35 (1906)). Unlike a proof of claim, which must be filed before the
15 bar date, an objection to a proof of claim may be filed at any time. *In re Consolidated Pioneer*
16 *Mortg.*, 178 B.R. at 225 (*citing In re Thompson*, 965 F.2d 1136, 1147 (1st Cir. 1992); *In re*
17 *Kolstad*, 928 F.2d 171, 174 (5th Cir. 1991), *cert. denied*, 502 U.S. 958 (1991)). Section 502(b) of
18 the Bankruptcy Code and Bankruptcy Rule 3007 permit a party in interest to object to a filed
19 proof of claim. An objection to a proof of claim initiates a contested matter and requires that a
20 hearing be held. 11 U.S.C. § 502(b); Fed. R. Bankr. P. 3007(a); Local Rule 3007(c).

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22 The Ninth Circuit Court of Appeals has described the shifting burdens of proof with
23 respect to objections to proofs of claim:

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25 Inasmuch as Rule 3001(f) and section 502(a) provide that a claim or
26 interest as to which proof is filed is "deemed allowed," the burden of
27 initially going forward with the evidence as to the validity and the amount
28 of the claim is that of the objector to that claim. In short, the allegations of
the proof of claim are taken as true. If those allegations set forth all the
necessary facts to establish a claim and are not self-contradictory, they

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prima facie establish the claim. Should objection be taken, the objector is then called upon to produce evidence and show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves. **But the ultimate burden of persuasion is always on the claimant.** Thus, it may be said that the proof of claim is some evidence as to its validity and amount. It is strong enough to carry over a mere formal objection without more.

Wright v. Holm (In re Holm), 931 F.2d 620, 623 (9th Cir. 1991) (quoting 3 L. King, COLLIER ON BANKRUPTCY § 502.02, at 502-22 (15th ed. 1991)) [footnotes omitted] [emphasis added]. *See also Lundell v. Anchor Constr. Specialists, Inc.*, 223 F.3d 1035, 1040 (9th Cir. 2000) (holding that the bankruptcy court correctly understood that the ultimate burden of persuasion was on the creditor); *Spencer v. Pugh (In re Pugh)*, 157 B.R. 898, 901 (B.A.P. 9th Cir. 1993) (holding claimant bears ultimate burden of persuasion as to validity and amount of the claim by a preponderance of the evidence). If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. *Lundell*, 223 F.3d at 1039 (citations omitted).

Section 502(b)(1) requires disallowance of a claim if “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured. . .” 11 U.S.C. § 502(b)(1). The “applicable law” referenced in Section 502(b)(1) includes bankruptcy law as well as other federal and state laws. *Cavaliere v. Sapir*, 208 B.R. 784, 786-787 (D. Conn. 1997) (providing that “applicable law” includes bankruptcy law). A debtor is therefore allowed to raise any federal or state law defenses to a claim. *In re G.I. Industries, Inc.*, 204 F.3d 1276, 1281 (9th Cir. 2000) (stating that a claim cannot be allowed under Section 502(b)(1) if it is unenforceable under nonbankruptcy law); *Johnson v. Righetti*, 756 F.2d 738, 741 (9th Cir. 1985) (finding that the

1 validity of the claim may be determined under state law); *In re Eastview Estates II*, 713 F.2d
 2 443, 447 (9th Cir. 1983) (applying California law).
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4 III.

5 LEGAL ARGUMENT

6 **CREDITOR'S PROOF OF CLAIM MUST BE DISMISSED BECAUSE THE** 7 **DEBTOR SHOULD NOT HAVE TO INCUR UNDER THE PLAN THE** 8 **CREDITOR'S DISCRETIONARY AMOUNT DUE.**

9 Debtor should not be compelled to incur Creditor's attorney's fees, costs and claimed
 10 escrow balance in her plan. Creditor was aware that Debtor was current with her mortgage
 11 obligations and that there was no need to necessitate this filing. Debtor has not filed any
 12 documentation asserting that she abrogating the rights of the Creditor; yet they want to compel
 13 the payment of their own fees and costs for filing their proof of claim. Creditor could have
 14 simply informed the Debtor that the mortgage payment was going to change, which they have
 15 already done in this case. See Exhibit 1. Because the filing of Creditor's proof of claim was not
 16 necessary, and forces fees to be paid by Debtor, when she should not have to be compelled to do
 17 so, the proof of claim should be denied.
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IV.

CONCLUSION

Wherefore, Debtor objects to the proof of claim filed by Bank of America and request that it be stricken.

DATED this 30th day of September, 2015.

COHEN-JOHNSON, LLC

By: /s/ Michael V. Hughes
H. STAN JOHNSON, ESQ.
Nevada Bar No. 00265
MICHAEL V. HUGHES, ESQ.
Nevada Bar No. 13154
Suite 100
255 East Warm Spring Road
Las Vegas, Nevada 89119
Attorney for Debtor
Susan C. Keller